IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 228 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

AMBICA MILLS CO. LTD.,

Appearance:

MR BB NAIK instructed by MR MANISH R BHATT
for Petitioner
MR NM AHMEDI for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 27/02/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this Reference at the instance of the Revenue three questions have been referred for our opinion in respect of A.Y. 1983-84.

2. We have heard learned counsel Mr. B.B.Naik instructed by Mr. M.R.Bhatt for the Revenue. Though served, none appears for Official Liquidator for the respondent-Company which is in liquidation.

Question No.1

"Whether, the Appellate Tribunal is right in law and on facts in not treating the trading receipts of Rs. 3,17,79,885/- on account of additional excise duty as trading receipts and in directing the I.T.O. to delete the same ?"

3. Mr. Naik, learned counsel for the Revenue states that the controversy raised herein is concluded by the decision of this Court in PLASTIC PRODUCTS ENGINEERING CO. v. COMMISSIONER OF INCOME-TAX, (2000) 245 I.T.R. 349. In the said case also, the assessee-a manufacturer of industrial plastic goods credited the amount in question to the excise deposit account and claimed that it was not a trading receipt as the amount was received on condition that the deposit was to be refunded to the buyer in case the duty was not finally paid by the assessee. The claim was disallowed by the Income-tax Officer and the receipts were brought to tax. The Tribunal confirmed that view. In the Reference, at the instance of the assessee, this Court held that the assessee had received the disputed amount described as excise duty which it was otherwise entitled to collect as per of the sale price (though it showed it separately in the invoices) from the buyers, and that the amount had been collected in no other character except as seller of goods as part of the sale price at best subject to the stipulation that in case ultimately the liability to duty was not sustained the amount collected as duty would be refundable. This Court, therefore, held that the receipts were taxable as revenue receipts.

4. In view of the said decision, we hold that the Tribunal erred in not treating trading receipts of Rs. 3,17,79,885/- on account of additional excise duty as trading receipts and in directing the Income-tax Officer to delete the same. We accordingly answer the question in the negative i.e. in favour of the Revenue and against the assessee.

5. Question no.4

"Whether, the Appellate Tribunal is right in law and on facts in directing the I.T.O. to allow the deduction of Rs. 88,771/- in respect of commission paid to Mettur Beard-shell Pvt. Ltd.?"

6. Mr. Naik, learned counsel for the Revenue fairly states that the controversy raised herein is concluded by the decision of this Court in COMMISSIONER OF INCOME-TAX v. ASHOK MILLS LTD. (1996) 218 ITR 526, which was also pertaining to commission paid to Mettur Beard-Shell Pvt. Ltd., for the user of its trade-mark "Tebilized", where this Court held that such commission was revenue expenditure. We accordingly answer the question in the affirmative i.e. in favour of the assessee and against the Revenue.

7. Question No.6

"Whether, the Appellate Tribunal is right in law and on facts in directing the I.T.O. to examine the facts and grant appropriate relief under section 35B in respect of commission paid to foreign agents outside Indian ?"

8. Mr. Naik, learned counsel for the Revenue points out that the controversy raised herein is now concluded by the decision of the Supreme Court in ARAVINDA PARAMILA WORKS v. COMMISSIONER OF INCOME-TAX, (1999) 237 ITR 284, wherein the Supreme Court has held that the expenditure referred to in section 35B(1)(b)(iv) of the Income-tax Act, 1961 has to be incurred on the maintenance outside India of a branch, office or agency for the promotion of sales outside India of the assessee's goods, services or facilities and that such branch, office or agency should be for the promotion of sales outside India of the assessee's goods, services or facilities, but when payment is made of commission to agents outside India on the amount of turnover of the goods sold, it would not qualify for the relief under section 35B(i)(b)(iv).

9. In view of the above decision, we answer the question in the negative i.e. in favour of the Revenue and against the assessee.

10. The Reference stands disposed of accordingly, with no order as to costs.

(J.M.Panchal,J.) (M.S.Shah,J.)

(patel)